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Nos. 00-832, 00-843

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, *et al.*,

Petitioners,

v.

GULF POWER COMPANY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR RESPONDENTS AMERICAN ELECTRIC POWER SERVICE CORPORATION, COMMONWEALTH EDISON COMPANY, DUKE ENERGY CORPORATION, ALABAMA POWER COMPANY, GEORGIA POWER COMPANY, GULF POWER COMPANY, MISSISSIPPI POWER COMPANY AND SAVANNAH ELECTRIC POWER COMPANY

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether 47 U.S.C. § 224 grants the Federal Communications Commission ("FCC") jurisdiction to regulate pole attachments that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether 47 U.S.C. § 224 grants the FCC jurisdiction to regulate attachments of wireless telecommunications equipment.

RULE 29.6 STATEMENT

Respondents Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company and Savannah Electric Power Company are wholly-owned subsidiaries of the Southern Company.

Respondent American Electric Power Service Corporation is a wholly-owned subsidiary of American Electric Power Company, Inc.

Respondent Commonwealth Edison Corporation is wholly-owned subsidiary of Exelon Corporation.

Respondent Duke Energy Corporation has no parent or publicly-owned company owning 10% or more of the corporation's stock.

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COUNTERSTATEMENT OF THE CASE

The Pole Attachments Act, Pub. L. No. 95-234, § 6, 92 Stat. 35 (codified as amended at 47 U.S.C. § 224) was enacted in response to a perceived danger of anti-competitive practices by utilities in connection with cable television service. *FCC v. Florida Power Corp.*, 480 U.S. 245, 247 (1987). Cable companies had complained there were no practical alternatives to stringing their cables on utility poles, and that some utilities (principally telephone companies) had exploited their "monopoly" position over these "bottleneck facilities" by charging excessive rates for pole attachments. S. Rep. No. 95-580, at 13 (1977), *reprinted in* 1978 U.S.C.C.A.N. 109, 121. (Addendum A at 5a-6a (hereinafter "Add.")). To address these complaints, and to assist the cable industry (which was then in its infancy), Congress granted jurisdiction to the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. § 224(b)(1).[1] At the time, both the Administration and Congress expressed concern about granting jurisdiction to the FCC to regulate electric utility companies. H.R. Rep. No. 94-1630, at 33, 34 (1976) (Add. B at 60a-61a), H.R. Rep. No. 95-721, pt. 2, at 10, 12 (1977) (Add. C at 83a, 85a); 123 Cong. Rec. 14,974 (May 17, 1977) (statement by bill's sponsor, Sen. Ernest Hollings) (Add. D at 89a-90a). The Senate Report that accompanied the legislation explained that the FCC's new jurisdiction would be "strictly circumscribed" and triggered only "where space on a utility pole has been designated and is actually being used for communications by wire or cable." S. Rep. No. 95-580, at 15, *reprinted in* 1978 U.S.C.C.A.N. 109, 123 (Add. A at 9a).

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[1] A specific grant of jurisdiction was necessary because, as the FCC itself recognized, the FCC had no jurisdiction under existing law to regulate pole attachments. *California Water & Tel. Co.*, 64 F.C.C.2d 753, 758 (1977); *FCC v. Florida Power Corp.*, 480 U.S. at 248 n.1.

Congress implemented this jurisdictional restriction in three specific ways. First, it defined a "utility" subject to the statute as "a person . . . who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, for wire communications." 47 U.S.C. § 224(a)(1). Second, it defined the "usable space" on a pole as "the space above the minimum grade level which can be used for the attachment of wires, cables, and associated equipment." 47 U.S.C. § 224(d)(2). Third, the Act established strict boundaries on the Commission's exercise of its authority to determine "just and reasonable" rates for pole attachments, the lower end being the "additional costs of providing pole attachments," the upper end being the "fully-allocated costs" associated with the portion of the "usable space" attributable to the pole attachment. 47 U.S.C. § 224(d)(1).

An earlier version of the legislation would have granted the FCC jurisdiction to regulate "any attachment *for wire communication*," but was changed in the final bill at the behest of the FCC to "any attachment by *a cable television system*." H.R. Rep. No. 94-1630, at 2, 30 (Add. B at 29a, 53a-54a). As finally adopted, the Act was narrowly tailored to provide regulated rate coverage only to the cable industry, not to other entities (such as Western Union or the local telephone company) that attach wireline facilities to utility poles. H.R. Rep. No. 104-204, at 91 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 58 (noting that Section 224 was intended "to spur the growth of the cable industry").

In the late 1980's, cable companies began to provide services other than conventional video programming. In 1991, the FCC ruled that cable companies that provided commingled cable and other non-video services over the same coaxial cable were entitled to a single, regulated rate under the Pole Attachments Act. That rule was upheld by the D.C. Circuit in *Texas Utilities Electric Co. v. FCC*, 997 F.2d 925, 927 (D.C. Cir. 1993).

The *Texas Utilities* decision, issued five months before the introduction of the first version of what was later to become the Telecommunications Act of 1996, created a regulatory anomaly. At the time, cable operators were expected to move aggressively into the local telephone market; this was one of the motivating factors behind the new legislation. S. Rep. No. 104-23, at 3 (1995) ("Telephone companies are seeking the right to provide cable service in competition with cable companies. Similarly, cable companies are seeking the right to provide telephone service."); H.R. Conf. Rep. No. 104-458, at 148 (1996), *reprinted in* 1996 U.S.C.C.A.N. 10, 160 ("Some of the initial forays of cable companies into the field of local telephony therefore hold the promise of providing the sort of local residential competition that has consistently been contemplated."). Under *Texas Utilities*, however, cable companies that provided telecommunications services were entitled to regulated rates for their pole attachments, while telecommunications carriers providing the same telecommunications services were not.

Congress addressed this regulatory anomaly by adding telecommunications carriers to Section 224 coverage as part of the larger Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Congress accomplished this by expanding the definition of pole attachment from "any attachment by a cable television system" to "any attachment by a cable television system *or provider of telecommunications service*." 47 U.S.C. § 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). The 1994 Senate Report accompanying the legislation explains this change was "intended to remedy the anomaly of current law, under which cable systems providing telecommunications services are able to obtain a regulated pole attachment rate under Section 224 of the 1934 Act, while other providers of telecommunications services are unable to obtain a regulated pole attachment rate under Section 224." S. Rep. No. 103-367, at 65 (1994); *see also* H.R. Conf. Rep. No. 104-458, at 206 (1996), *reprinted in*

1996 U.S.C.C.A.N. 10, 200.[2] Congress did not extend Section 224 coverage to *all* telecommunications carriers, but rather excluded incumbent local exchange carriers. 47 U.S.C. § 224(a)(5) ("[f]or the purposes of this section, the term 'telecommunications carrier' * * * does not include any incumbent local exchange carrier"). Incumbent local exchange carriers continue to pay pole attachment rates well in excess of the low regulated rates paid by cable companies and telecommunications carriers.[3]

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[2] The purpose behind the 1996 amendments was *not*, as the FCC stated in the rulemaking below and Petitioner National Cable Television Association ("NCTA") repeats in its brief, "to remedy the inequitable position between pole owners and those seeking pole attachments," Gov't Pet. App. 86a, 13 F.C.C.R. 6777, 6794 ¶31, NCTA Br. at 31. The purpose was to remedy the inequitable position between cable companies providing telecommunications service and telecommunications companies providing telecommunications service.

[3] Petitioners assert that incumbent LECs were excluded from § 224 coverage because "there was no need to provide rate protection to entities that usually owned or controlled the poles themselves." Fed. Pet. Br. at 18. The implication that incumbent LECs own or control all of the poles they use to string their wires is untrue. ILECs typically own less than half of the poles in any service area, and in some regions, less than 20%. The common term "telephone pole" is largely a misnomer; in the majority of cases, incumbent LECs do *not* own or control the poles to which they attach.

Congress excluded incumbent LECs from Section 224 coverage because they were not a fledgling industry that Congress wanted to promote through subsidized pole attachment rates. The Telecommunications Act of 1996 was principally aimed at fostering competition to the incumbent LECs in the local telephone markets. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 416 (1999). The core provisions of the Act are designed to help other carriers to compete with incumbent LECs by accessing the incumbent LECs' networks. The evident purpose of extending Section 224 coverage to these new carriers and not to incumbent LECs was to provide a financial advantage to the new entrants to help them compete in the local telephone markets.

Congress also made a number of other important changes to the Pole Attachments Act in 1996. These include the following:

First, whereas this Court had held in *FCC v. Florida Power Corp.*, 480 U.S. 245, 251 (1987) that access to utility poles under the 1978 Act was *voluntary* and thus not a taking under the Fifth Amendment, Congress made access *mandatory* by adding a new Section 224(f)(1), which provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1) (Supp. IV 1998).[4]

Second, Congress prescribed a second pole attachment rate to be established by the FCC. Before 1996, Section 224(d) had set forth a single standard for determining "just and reasonable" rates for attachments by a cable television system. In 1996, Congress provided that the Section 224(d) standard "shall apply to the rate for any pole attachment used by a cable television system *solely to provide cable service*." 47 U.S.C. § 224(d)(3) (Supp. IV 1998) (emphasis added). Congress also provided that the Commission "shall * * * prescribe regulations in accordance with" a different standard "to govern the charges for pole attachments used by *telecommunications carriers* to provide *telecommunications services*." 47 U.S.C. § 224(e)(1) (Supp. IV 1998) (emphasis

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[4] In a ruling not at issue in this appeal, the court below held that the new mandatory access provisions of Section 224(f)(1) effect a taking of utility property under the Fifth Amendment to the U.S. Constitution. Gov't Pet. App. at 18a, 208 F.3d at 1272. The court went on to hold, however, that the question of whether the FCC's rate formula provides just compensation was not yet ripe. Gov't Pet. App. at 19a, 208 F.3d at 1272. Cases challenging the constitutionality of the FCC's rate formula in the context of specific pole complaints currently are pending in the Eleventh Circuit. *Alabama Power Co. v. FCC*, No. 00-14753 and consolidated cases (11th Cir. *filed* September 13, 2000).

added). Much as it had with cable attachments, Congress placed strict boundaries around the FCC's discretion to determine "just and reasonable" rates for telecommunications attachments. 47 U.S.C. § 224(e).

Significantly, several parts of Section 224 remained intact. The 1996 amendments did not change the Act's jurisdictional restriction to utilities which own or control facilities "used, in whole or in part, for any *wire communications*." 47 U.S.C. § 224(a)(1). Nor did Congress change the definition of "usable space" as "the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2). Indeed, Congress specifically made the concept of "usable space" applicable to attachments for "telecommunications carriers" through the new rate formula established in Section 224(e).[5]

To date, the FCC has implemented the 1996 amendments to the Pole Attachments Act in four separate rulemaking proceedings. This case involves one of those rulemaking proceedings. *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attach-*

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[5] The new Section 224(e) provides, in pertinent part:

* * * *

(2) A utility shall apportion the cost of providing space on a pole, duct, conduit, or right-of-way other than the *usable space* among entities so that such apportionment equals two-thirds of the costs of providing space other than the *usable space* that would be allocated to such entity under an equal apportionment of such costs among all attaching entities.

(3) A utility shall apportion the cost of providing *usable space* among all entities according to the percentage of *usable space* required for each entity.

47 U.S.C. § 224(e).

ments, 13 F.C.C.R. 6777 (1998); Gov't Pet. App. D.[6] As pertinent here, the FCC determined that cable operators are entitled to the benefits of Section 224 when providing commingled Internet and cable services. The FCC based this conclusion on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms, and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes 'any attachments by a cable television system.'" Gov't Pet. App. at 90a, 13 F.C.C.R. at 6796 ¶34. Further, the FCC determined that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate," Gov't Pet. App. at 87a, 13 F.C.C.R. at 6794 ¶32, notwithstanding Section 224(d)(1)'s mandate that this rate shall apply to attachments used "solely to provide cable service." 47 U.S.C. § 224(d)(3) (Supp. IV 1998). The Commission explained that its decision was based solely on its regulatory authority under Section 224(b)(1), Gov't Pet. App. at 87a, 13 F.C.C.R. at 6794 ¶33, and not on a determination of whether Internet service was a "cable service" or a "telecommunications service" under Section 224(d) or 224(e). The Commission stated it "need not decide at this time * * * the precise category into which Internet services fit," Gov't Pet. App. at 89a, 13 F.C.C.R. at 6795 ¶34, although it noted it had concluded in an earlier proceeding that "Internet service is not the provision of a telecommunications service under the 1996 Act." Gov't Pet. App. at 87-88a, 13 F.C.C.R. at 6795 ¶33.

The Commission made one other holding in the rulemaking relevant here. It determined that the 1996 amendments extend the "benefits and protections" of Section 224 to

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[6] The FCC has completed one other rulemaking, which currently is on review in the Eleventh Circuit. *Southern Co. v. FCC*, No. 99-15160-GG and consolidated cases (11th Cir. *filed* Dec. 16, 1999) (oral argument scheduled Aug. 28, 2001).

attachments of wireless telecommunications equipment. Gov't Pet. App. at 94a, 13 F.C.C.R. at 6798 ¶39.

Electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. Pursuant to the FCC's motion, the cases were consolidated in the Eleventh Circuit. The panel reversed the FCC's conclusions that the Pole Attachments Act, as amended in 1996, covers attachments used for commingled cable and Internet service. The panel also reversed the FCC's determination that the Act covers attachments of wireless telecommunications equipment. Petitions for rehearing *en banc* were denied. Petitions for a writ of certiorari were filed by the Government and the NCTA. The Court granted both petitions on January 22, 2001 and ordered the cases consolidated.

SUMMARY OF ARGUMENT

The FCC has regulated an unregulated service (cable Internet service) and an unregulated market (for siting wireless telecommunications equipment) solely for purposes of Section 224. These result-oriented decisions, which grant "subsidized" pole attachment rates to some of the FCC's largest constituents (cable companies and wireless carriers) at the expense of electric utility ratepayers, are beyond the scope of the regulatory power granted by Congress. If Petitioners wish for cable Internet service and wireless telecommunications equipment to be brought within the ambit of pole attachment regulation, their proper appeal is to Congress to change the existing law, not to this Court.

1. In Section 224(b)(1), Congress granted the FCC the power to regulate the "rates, terms, and conditions" of pole attachments to ensure that such "rates, terms and conditions" are "just and reasonable." In Sections 224 (d) and (e), Congress established highly detailed standards to circumscribe the FCC's exercise of its power to establish rates for

pole attachments for two types of service: cable service, which is regulated more broadly under Title VI of the Communications Act, and telecommunications service, which is regulated under Title II. 47 U.S.C. §§ 224(d), (e). Subsections (d) and (e) define and limit the FCC's regulatory power; no other rates are authorized. Congress cannot reasonably be presumed to have provided these detailed standards to define the exercise of the FCC's power to regulate pole attachment rates for cable and telecommunications services, yet to have provided a virtually unlimited power to regulate pole attachment rates for other services (cable Internet services) that the FCC does not otherwise regulate. Congress' grant of power to regulate pole attachment rates cannot rationally be understood to actually *expand* when the services provided over an attachment fall outside the FCC's broader regulatory jurisdiction under the Communications Act.

Petitioners' textual argument rests on the claim that "any attachment by a cable television system" in 47 U.S.C. § 224(a)(4) means "any attachment by a cable television *company*." This argument fails, however, since in 1996 Congress extended the statutory definition of "cable system" to Title II of the Communications Act, which includes Section 224. 47 U.S.C. § 522(7); 47 U.S.C. § 153(7). This definition provides that a "cable system" refers to a set of facilities, not the owner of the facilities, and limits the facilities to traditional cable service where the owner is otherwise regulated by the FCC as a common carrier. 47 U.S.C. § 522(7). Most major cable companies are regulated as common carriers because they provide cable telephony to residential and business customers. Thus, "any attachment by a cable system" means any attachment by facilities used to deliver traditional video programming.

The court of appeals' holding below is fully consistent with Congress' policy pronouncements in the 1996 Act. While

Congress declared a national policy to encourage deployment of the Internet, 47 U.S.C. §§ 157, statutory note, 230(b)(1), Congress also declared that the Internet should be "unfettered by Federal or state regulation." 47 U.S.C. § 230(b)(2). Petitioners' argument that Congress *must* have intended to subsidize cable Internet is based on the faulty logic that a Congressional desire to promote a particular segment of the economy *automatically* translates into a federal subsidy program. There is no support for this assumption, especially given that it would translate into Congress picking winners and losers in the marketplace—in this case, by providing subsidized pole attachments to cable operators for Internet service while denying it to incumbent local exchange carriers, cable's major competitors in the delivery of Internet service.

The rate formulas contained in Sections 224 (d) and (e) are mandatory, not discretionary, and thus compel a decision as to whether cable modem service is a cable service or a telecommunications service. The court of appeals was correct that it is neither. Clearly, it is not a "cable service," the essence of which is the one-way transmission of programming to subscribers, rather than interactive and individual transmission like the Internet. Moreover, it is not a "telecommunications service," despite the appeal of the argument that Internet access service delivered by a cable company should be regulated in the same manner (as a "telecommunications service") as Internet access service delivered by a local exchange carrier. The FCC has already concluded that Internet access is an "information service," not a "telecommunications service," and that Internet access service does not become a "telecommunications service" merely by virtue of the fact that it is offered to customers through a telecommunications pipeline.

2. The court of appeals' holding that Section 224 does not cover wireless telecommunications equipment is also correct. When the Pole Attachments Act was passed in 1978,

Congress made clear that the expansion of FCC jurisdiction was "strictly circumscribed" and limited to dealing with arrangements affecting the "communications space" on utility poles, that is, the space used for the attachments *of wires, cables and associated equipment*. Congress implemented this jurisdiction limitation in the definition of "utility" in Section 224(a)(1) ("a person * * * who owns or controls poles, ducts, conduits or rights-of-way used, in whole or in part, for *wire communications*") and in the definition of the "usable space" on the pole in Section 224(d)(2) ("the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*"). The concept of "usable space" was incorporated into the standard established in Section 224(d) for attachments by a cable television system.

In 1996 Congress did not change the Act's limitation to the wireline communications space. The definition of "utility" remained unchanged, as did the definition of "usable space." Indeed, the concept of "usable space" (with its limitation to wires, cables and associated equipment) was incorporated into the new statutory formula for telecommunications attachments. 47 U.S.C. § 224(e). Congress cannot have intended Section 224(e) to cover wireless telecommunications equipment when it defined the ratemaking formula for telecommunications attachments in terms of wires, cables and associated equipment.

Congress did not utter a word about siting wireless equipment in Section 703 of the 1996 Act, which amended Section 224. Congress did, however, address the topic at length in the next section of the 1996 Act, which established a "National Wireless Telecommunications Siting Policy." 47 U.S.C. § 332. The court of appeals is correct that the extensive discussion of wireless siting in Section 704, coupled with Section 703's silence on the subject, indicates that Congress did not intend the Pole Attachments Act to cover wireless telecommunications equipment.

This conclusion is supported by the fact that utility poles are not bottleneck facilities for wireless equipment. A thriving free market exists for siting wireless equipment, on towers, on monopoles, on rooftops, on billboards, etc. These unregulated sites typically command rental rates of $1,500 to $2,000 a month, while a regulated pole attachment rate is about $6 a year. Congress surely cannot be presumed to have taken the dramatic step of regulating a tiny segment of the wireless siting market in Section 224 without a word, particularly given its extensive discussion of the subject elsewhere in the same statute.

ARGUMENT

I. SECTION 224 DOES NOT APPLY TO ATTACHMENTS USED FOR DELIVERY OF COMMINGLED CABLE AND INTERNET SERVICE.

The case against Petitioners can be couched in the form of a *reductio ad absurdum* argument, starting with the FCC's absurd result: that notwithstanding Congress' explicit command that the Section 224(d) rate applies to attachments used "solely to provide cable service," attachments for commingled cable and Internet service are entitled to the Section 224(d) rate. Gov't Pet. App. 89a-90a, 13 F.C.C.R. at 6795-6796 ¶34. Since cable modem service is not a "cable service," this holding is directly contrary to the plain language of the statute and cannot be sustained.

The FCC has reached this absurd result—a result so embarrassing it is relegated to a footnote in the Government's brief, Govt. Br. at 26 n.10—because of the FCC's stubborn refusal to rule on the proper regulatory treatment of cable modem service. To be sure, the regulatory treatment of cable modem service has ramifications far beyond the world of pole attachments. Nonetheless, the FCC's insistence on avoiding this decision—coupled with its desire to favor its commun-

ications constituents (cable companies) with cheap pole attachment rates at the expense of electric utility ratepayers—has led it to a tortured reading of Section 224. The absurd result is a clear indication that *something*, at least, is wrong with the FCC's reading of the statute.

A. Sections 224(d) and (e) Define And Limit The FCC's Ratemaking Power.

This case involves four subsections of the Pole Attachments Act. The first is Section 224(b)(1)'s grant of power to the FCC to regulate the "rates, terms and conditions for pole attachments." The second is Section 224(a)(4)'s definition of "pole attachment" as "any attachment by a cable television system or provider of telecommunications service." The third and fourth are the specific standards defining and limiting the manner in which the FCC can exercise its Section 224(b)(1) regulatory power: Section 224(d) for "any attachment used by a cable television system *solely to provide cable service*;" and Section 224(e) for "pole attachments used by *telecommunications carriers* to provide *telecommunications services*."

Petitioners' central argument is that the FCC's grant of power in Section 224(b)(1) to regulate pole attachments can be decoupled from the specific standards Congress established for the exercise of that power in subsections (d) and (e). This piecemeal reading of the statute violates the "cardinal rule" that a statute must be read as a whole. *King v. St. Vincents Hosp.*, 502 U.S. 215, 220 (1991). Congress *defined and limited* the FCC's general grant of power to set "just and reasonable rates" for pole attachments through the specific standards set out in subsections (d) and (e) for attachments used for cable service and telecommunications service. As the court held below:

> The straightforward language of subsections (d) and (e) directs the FCC to establish two specific just and

> reasonable rates, one for cable television systems providing solely cable service and one for telecommunications carriers providing telecommunications service; *no other rates are authorized.*

Gov't Pet. App. at 27a; 208 F.3d at 1276 n.29 (emphasis added).

Congress established highly detailed standards in subsections (d) and (e) to define and limit the FCC's exercise of its power to establish just and reasonable rates for cable and telecommunications attachments. Congress cannot reasonably be assumed to have provided these highly detailed standards for the Commission's exercise of its power to set rates for cable and telecommunications attachments, yet to have provided an entirely *unbounded* power to the Commission to set just and reasonable rates for *other* services (including Internet services).[7] There is nothing in the text or the legislative history that would support such a reading.

The FCC acknowledges that prior to 1996, Section 224 set "a single regulated rate for pole attachments" (the "Cable Rate") that "*must* fall within the parameters established by Section 224(d)(1)." *Heritage Cablevision Assocs. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099, 7106 ¶32 (1991) (emphasis added). According to the FCC, Section 224 made "no

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[7] This conclusion is supported by the familiar principal of statutory construction which holds that "the express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Alexander v. Sandoval*, 149 L. Ed. 2d 517, 2001 U.S. LEXIS 3367, *28 (2001); *see also Northwest Airlines, Inc. v. Transport Workers Union of Am.*, 451 U.S. 77, 93-94 (1981) ("[T]he comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies."). Surely the express provision of detailed sets of standards in subsections (d) and (e) for cable and telecommunications services suggests that Congress intended to preclude regulation of attachment rates for other types of services.

provision for disparate rates based on the type of service provided." *Id.* at 7106 ¶31. Rather, Section 224 "permit[ted] a single, regulated, just and reasonable rate for pole attachments." *Id.*

In 1996, Congress amended Section 224 to cover telecommunications companies. In doing so, Congress sought to level the playing field between cable companies providing telecommunications services and competing telecommunications companies providing the same services. Congress provided an additional rate for "pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e) (the "Telecom Rate"). As it had done in 1978 with regard to the Cable Rate, Congress again specifically limited the FCC's discretion in setting the Telecom Rate by defining what satisfies the "just and reasonable" standard. 47 U.S.C. § 224(e). There are two rates under the Act and two rates only.

This conclusion is underscored by the restrictions Congress placed on the FCC's ratemaking power elsewhere in the Telecommunications Act of 1996. In Section 252(d)(1), Congress granted the FCC power to prescribe standards for rates to be charged for new entrants to interconnect with, or lease elements of, incumbent LECs' existing networks.[8] As in Section 224, Congress did not grant this power under an unqualified "just and reasonable" standard, but rather specifically prescribed that the rates must be "based on the cost . . . of providing" interconnection or the network element. 47 U.S.C. §§ 251(c)(3), 252(d)(1). Congress further qualified this power by requiring that these rates be

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[8] Challenges to the FCC's TELRIC rules implemented pursuant to this authority were granted by this Court on the same day the Court granted cert. in the instant cases. *Verizon Communications, Inc. v. FCC*, Nos. 00-511, 00-555, 00-590 and 00-602 (*cert. granted* Jan. 22, 2001).

"determined without reference to a rate-of-return or other rate-based proceeding" of the kind that had traditionally been used to set the incumbents' local retail rates. 47 U.S.C. § 252(d)(1)(A)(i). The fact that Congress did not grant the FCC ratemaking power under a bare "just and reasonable" standard in the interconnection provisions of the 1996 Act supports the notion that Congress did not grant the FCC power to set rates under a bare "just and reasonable" standard elsewhere in the same statute.[9]

This reading also is consistent with the larger structure of the Communications Act of 1934, which provides separate and comprehensive schemes of regulation for cable service (Title VI) and for telecommunications service (Title II). A service that does not fit into one of these regulatory boxes is unregulated. It is only natural for Congress to require that a service must be regulated generally (either under Title VI as a cable service or Title II as a telecommunications service) in order to be subject to regulation for pole attachment purposes.

B. The FCC Cannot Avoid Classifying Cable Modem Service.

Another reason the FCC's tortured approach to Section 224 is unreasonable is that subsections (d) and (e) are mandatory,

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[9] Congress' use of the "just and reasonable" standard traces its origin to the Interstate Commerce Act of 1887, 24 Stat. 379 (1887), through which Congress created the Interstate Commerce Commission and granted it the power to set "just and reasonable" rates for railroads. *See generally* Joseph D. Kearney, *The Great Transformation of Regulated Industries Law*, 98 Colum. L. Rev. 1323 (1998). This Court has held the "just and reasonable" standard bestows a virtually unlimited power to set rates. *See FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602, 611 (1944); *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989). In the Telecommunications Act of 1996, Congress chose not to grant the FCC ratemaking power under the historical "just and reasonable" standard (with all the unbridled discretion that entails), but instead provided detailed guidance for the Commission's exercise of its ratemaking power.

not discretionary. Section 224(d)(3) says "[t]his subsection *shall* apply to the rate for any pole attachment used by a cable television system to provide cable service." 47 U.S.C. § 224(d)(3) (emphasis added). Section 224(e)(3) states: "The Commission *shall* * * * prescribe regulations in accordance with this subsection to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. § 224(e)(3) (emphasis added). The FCC admits that these rates are mandatory:

> We note that in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e). In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable in situations where the Commission is not *statutorily required to apply the Section 224(e) rate.*

Gov't Pet. App. at 90a, 13 F.C.C.R. at 6796 ¶34 (emphasis added). At the very least, therefore, it is far more natural to read the statute as asking the Commission first to determine whether the mandatory rates prescribed by subsections (d) or (e) apply, since, if they do, that is the end of the matter and there is no need to determine whether the Commission has discretion to set rates for services that hypothetically might fall outside of the "cable service" or "telecommunications service" classifications. The Commission's explicit refusal to undertake this analysis[10] underscores the capriciousness of its ruling.

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[10] "We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems

Ironically, the implausibility of severing the Commission's general grant of regulatory power under Section 224(b)(1) from the implementing standards set out in subsections (d) and (e) is underscored by the Commission's very attempt to exercise its Section 224(b)(1) power. The Commission undertook its analysis in two steps. First, it determined whether it had the power to regulate commingled cable and Internet attachments, then it considered what rate would apply. In the first step, the Commission bifurcated the statute and determined that Section 224(b)(1), standing alone, empowers it to regulate commingled cable and Internet attachments. In the second step, however, the FCC yoked the statute back together, turning to the specific standards established by Congress to conclude that the "just and reasonable rate for commingled cable and Internet service is the Section 224(d)(3) rate." Gov't Pet. App. at 87a, 13 F.C.C.R. at 6796 ¶32. Setting aside that the Section 224(d)(3) rate applies to attachments *solely to provide cable service* (which commingled cable and Internet attachments are not), this exercise shows that in practice, the FCC found itself compelled to use the standard set by Congress in Section 224(d) to implement its Section 224(b)(1) power. The Act is no more severable as a practical matter than it is as a matter of law.

C. A "Cable Television System" Is Not Synonymous With A Cable Company.

Petitioners' textual argument rests entirely on the proposition that "[a]n attachment by a cable television system that is used to provide commingled cable television service and Internet access is an attachment 'by a cable television system' as that term is used in 47 U.S.C. § 224(a)(4)." Gov't Br. at 11. This argument in turn rests on the assumption that

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using pole attachments to provide traditional cable services and Internet services." Pet. App. 89a, 13 F.C.C.R. at 6795 ¶34.

"cable television system" refers to a cable *company*, and thus that anything a cable company attaches to a pole is a "pole attachment" for purposes of Section 224.

This argument does not withstand scrutiny. Congress defined the term "cable system" in the Cable Act of 1984 to refer to a set of facilities, *not* the operator of the facilities:

> [T]he term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include * * * * (C) any facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system * * * * to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.

47 U.S.C. § 522(7).[11] "Cable operator" is separately defined, 47 U.S.C. § 522(5), as is "cable service," 47 U.S.C. § 522(6).

Prior to the 1996 Act, the "cable system" definition applied only to Title VI of the Communications Act, not to Title II (which includes Section 224). In 1996, however, Congress extended the "cable system" definition to the Communications Act as a whole (including, of course, Section 224). 47 U.S.C. § 153(7).

Thus a "cable system," as that term is defined and used in Section 224(a)(4),[12] refers to a set of facilities operated by a

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[11] The FCC has issued regulations defining the terms "cable system" and "cable television system" with the same language Congress used in 47 U.S.C. § 522(7). 47 C.F.R. § 76.5(a) (2000).

cable company, not to the cable company itself; and if the cable company is regulated as a common carrier, then its facilities are a "cable system" *only to the extent they are used to transmit video programming*. 47 U.S.C. § 522(7). In other words, if a cable company provides telecommunications service and thus is regulated by the FCC as a common carrier, then its network is deemed to be a "cable system" only to the extent it is used to transmit traditional cable service. This distinction in the "cable system" definition (47 U.S.C. § 522(7)) tracks directly with the distinction between attachments used *solely to provide cable service* and attachments used to provide *tele-communications service* in 47 U.S.C. §§ 224 (d) and (e).

In fact, most major cable companies are now common carriers subject, in part, to the provisions of Title II, through the delivery of residential and/or commercial telephone service over the cable company's fiber optic network. Petitioner NCTA's January 2001 Cable Television Handbook, which can be downloaded from NCTA's web site, acknowledges that "[t]he cable industry is now expanding its competitive offerings to include business and residential telephone as well as data services." NCTA, *Cable Television Handbook* 6-D-1 (2001), *available at* http://www.ncta.com/pdf_files/Handbook-Total.pdf. The Handbook notes that "[a]t least nine of the nation's largest multiple system operators (MSOs) now offer residential and/or commercial phone service in more than 45 markets overall, and companies have reached interconnection agreements in 40 states and the District of Columbia."[13]

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[12] Section 224(a)(4) uses the term "cable television system," not "cable system," but as noted at note 10, *supra*, the FCC's regulations treat these two terms as synonymous. 47 C.F.R. § 76.5(a).

[13] The nine cable companies include Adelphia Business Solutions/Hyperion, Cablevision Systems, Cablevision Lightpath, Comcast Cable, Cox Communications, Cox Fibernet, AT&T Broadband,

Where cable companies are common carriers, their facilities are "cable systems" only to the extent they are "used in the transmission of video programming directly to subscribers" under 47 U.S.C. § 522(7). Since Internet access provided by cable modem service clearly is not the transmission of video programming directly to subscribers, Petitioners' textual argument that the phrase "any attachment by a cable television system" in Section 224(a)(4) includes cable modem service is meritless.

Prior to 1996 it was unclear whether Congress intended its definition of "cable system" to apply to Section 224. *Texas Utilities Elec. Co. v. FCC*, 997 F.2d 925, 931-932 (D.C. Cir. 1993). The D.C. Circuit relied on this ambiguity in *Texas Utilities* in affirming the FCC's reading of "cable television system" as referring to a cable company, rather than a set of facilities. *Id.* at 932. Congress eliminated that ambiguity in 1996 by extending the "cable system" definition (47 U.S.C. § 522(7)) to the entire Communications Act. 47 U.S.C. § 153(7). While there is still some awkwardness in the

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Service Electric Cable, Time Warner Cable, and Time Warner Telecom. *Id.* at 6-D-4-6.

Cable companies are also required to report their telecommunications revenues to the FCC on Form 499-A. The FCC publishes a report listing companies that provided interstate telecommunications service, which includes the cable companies identified above and many other cable companies not listed in the NCTA Handbook. *See* Katie Rangos and Jim Lande, *Carrier Locator: Interstate Service Providers* (FCC Common Carrier Bureau, Oct. 2000), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/Locator/locat00.pdf. The FCC uses the data reported on Form 499-A to calculate contributions required of cable companies and other carriers under Title II to the universal service fund and other cost-sharing mechanisms. *See* FCC, *Instructions for Completing the Worksheet for Filing Contributions to Telecommunications Relay Service, Universal Service, Number Administration, and Local Number Portability Support Mechanisms* (2001), *available at* http://www.fcc.gov/Forms/Form499-A/499a.pdf.

statutory language (any attachment *by* a set of facilities rather *for* or *of* a set of facilities), Congress' application of the "cable service" definition to Section 224 in 1996 effectively puts an end to this debate. Congress has said a "cable system" is a set of facilities, and that is the end of the matter. Even if this creates unanticipated consequences (deregulating cable company attachments when cable companies enter the competitive marketplace for Internet access), this is what Congress has said. "If this is not what Congress meant, then Congress has made a mistake and Congress will have to correct it." *Conroy v. Anishoff*, 507 U.S. 511, 528 (1993) (Scalia, J., concurring).

D. Cable Modem Service Is Neither A Cable Service Nor A Telecommunications Service.

1. Cable Service

The Communications Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). Video programming, in turn, is defined as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and "other programming service" means "information that a cable operator makes available to all subscribers generally," 47 U.S.C. § 522(14).

The FCC, in fact, already has determined that Internet service is in no way "comparable" to video programming provided by a television broadcast station and thus "falls outside the definition of 'video programming'" under the Communications Act. *In re Internet Ventures, Inc.*, 15 F.C.C.R. 3247, 3254 ¶13 (2000). Nor does Internet service constitute an "other programming service," which is limited

to "information that a cable operator makes available to all subscribers generally." 47. U.S.C. § 522(14). Many of the services provided via the Internet, whether it is the ability to send and receive e-mails, participate in chat rooms, or to create and access a unique home page on a "portal" such as Yahoo!, involve content organized in a format dictated and seen exclusively by that customer. As the Ninth Circuit stated in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 876 (9th Cir. 2000):

> Internet access is not one-way and general, but interactive and individual beyond the 'subscriber interaction' contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communications unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming.

216 F.3d at 876. The essence of cable service, therefore, is "one-way transmission of programming to subscribers generally." *Id.* Internet service does not fit this definition.[14]

Furthermore, applying the "carefully tailored scheme of cable television regulation to cable broadband access would lead to absurd results, inconsistent with the statutory structure." *AT&T Corp. v. City of Portland*, 216 F.3d at 877. The court summarized this as follows:

> [C]able operators * * * may be required by the franchising authority to set aside cable channels for public, educational or governmental use, see 47 U.S.C. § 531, must designate some of their channels for commercial use by persons unaffiliated with the

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[14] The FCC acknowledged in its *amicus* brief in the *City of Portland* case that "[s]trong arguments have been advanced in support of the argument that Internet access via cable is *not* a cable service." Br. at 20.

> operator, see 47 U.S.C. § 532, and must carry the signals of local commercial and non-commercial educational television stations, see 47 U.S.C. §§ 534 & 535. We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet.

Id.

The Ninth Circuit's analysis in *City of Portland* is consistent with the Eleventh Circuit's reasoning below in so far as both courts rejected the argument that Congress intended to include Internet service in the statutory definition of "cable service." The only difference in the definition of "cable service" between the 1978 Act and the 1996 Act is the inclusion of the words "or use" in § 522(6)(B) ("subscriber interaction, if any, which is required for the selection *or use* of such video programming or other programming service"). The single sentence of legislative history which attempts to explain this addition states that the inclusion of "or use" was meant to "reflect [ ] the evolution of video programming toward interactive services." H.R. Rep. No. 104-204 at 97 (1995), *reprinted in* 1996 U.S.C.C.A.N. at 64. The Eleventh Circuit reasoned in the opinion below:

> Although what it means to reflect an evolution of video programming toward interactive service is not exactly clear, it is clear from Congress' lack of discussion of this change that it was minor in both language and intent. If Congress by the addition of these two words meant to expand the scope of the "cable service" definition from its traditional video base to include all interactive services, video and non-video, it would have said so. Without any substantive comment, we will not read this minor change to effectuate a major statutory shift.

Gov't Pet. App. 28a, 208 F.3d at 1276-1277. Surely this is correct. As this Court has said, "Congress * * * does not alter

the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'ns, Inc.*, 121 S. Ct. 903, 910 (2001).

2. Telecommunications Service.

While cable modem service is clearly not a "cable service," it is also not a "telecommunications service." The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public regardless of the facilities used." 47 U.S.C. § 153(46). The crux of the argument in favor of classifying cable modem service as a "telecommunications service" is that cable modem service consists of two elements: a "pipeline" and the Internet service transmitted through that pipeline. *AT&T v. City of Portland*, 216 F.3d at 878.[15] This tracks the definition of an "information service," which means "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information *via telecommunications* * * *." 47 U.S.C. § 153(20) (emphasis added). The FCC has defined Internet access service as an information service. *In re Federal State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,532-11,533 ¶66 (1998). Because information service is *by definition* provided "via telecommunications" (*e.g.*, through the "pipeline"), the provision of Internet access via cable modem service must either *be* a telecommunications service, the argument goes, or *include* a telecommunications service.

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[15] *Amici* United States Telecom Association, *et al.*, echo the Ninth Circuit's "pipeline" metaphor when they say that "[w]hatever else the cable operator is doing, it is serving as a basic transparent conduit from a user's residence to the ISP point of presence (and the Internet beyond) * * *." Br. at 7-8.

Certainly this argument has appeal, as indeed do the arguments by *amici* United States Telecom Association, *et al.* to the effect that cable modem service should be regulated in the same way as their xDSL service, which the FCC has classified as a telecommunications service. *See In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 F.C.C.R. 385, 388-389 ¶9 (1999); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,011, 24,030 ¶36 (1998); *see also AT&T Corp. v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000). The phone companies' xDSL service provides the same high-speed Internet access as cable modem service, the only difference being the service is provided over phone lines rather than a cable network. However appealing, though, the argument ultimately fails, because the FCC has already ruled that the fact Internet service is provided "via telecommunications" (through a "pipeline"), without more, is not enough to transform that service into a "telecommunications service."

The FCC has ruled that "telecommunications services" and "information services," are "mutually exclusive." *In re Federal State Joint Board on Universal Service*, 13 F.C.C.R. 11,501, 11,508 ¶13 (1998). As noted *supra*, the FCC has ruled that Internet service is an "information service," 13 F.C.C.R. at 11,532-11,533 ¶66, but has also held that entities providing information services "are not thereby providing 'telecommunications service.'" 13 F.C.C.R. at 11,516 ¶33, *citing In re Federal State Joint Board on Universal Service*, 12 F.C.C.R. 8780, 9179-80, ¶¶788-89 (1997). The FCC explained that "a single entity can be both a telecommunications provider and an information services provider, but only in connection with its offering of separate services; it cannot gain that dual status merely as a result of its offering of a single service." 13 F.C.C.R. at 11,520 ¶39 n.77. In short, the Commission has concluded, "[a]n offering that constitutes a single service from the end user's standpoint

is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components." 13 F.C.C.R. at 11,529-11,530 ¶58. These conclusions, of course, are subject to customary deference. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).[16]

To be sure, the FCC has declined to apply this analysis to cable modem service,[17] and has issued a "Notice of Inquiry" to solicit views regarding what regulatory treatment, if any, should be accorded to cable modem service. However, there is no apparent reason the Commission's existing analysis of "hybrid" services should not apply to cable modem service, nor any indication of when, or even if, the FCC intends to rule on the subject. *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000).[18]

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[16] The FCC's determination that Internet service is not a telecommunications service is consistent with the definition of "Internet access service" enacted by Congress in 1998 as part of the Child Online Protection Act, Pub. L. No. 105-277 § 1402 (1998), 112 Stat. 2681-736, (codified at 47 U.S.C. § 231). This statute, which is being challenged on First Amendment grounds in this Court in *Ashcroft v. ACLU*, No. 00-1293 (*cert. granted* May 21, 2001), defines Internet access service as a "service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may include access to proprietary content, information, and other services as part of a package of services offered to consumers. *Such term does not include telecommunications services.*" 47 U.S.C. § 231(e)(4) (emphasis added).

[17] "We express no view in this Report on the applicability of this analysis to cable operators providing Internet access service." 13 F.C.C.R. at 11,535 ¶67 n.140.

[18] The FCC's regulations provide that "proceedings commenced issuing a 'Notice of Inquiry' * * * do not result in the adoption of rules, and Notices of Inquiry are not required to be published in the Federal Register." 47 C.F.R. § 1.430 (2000). Thus, the FCC cannot adopt rules governing the classification of cable modem service until the current proceeding is complete and the Commission undertakes a formal notice

Given the fact that five years after the passage of the 1996 Act there still are no visible signs that an FCC ruling on this issue is imminent, this Court should take the responsibility to decide this important question. Given the FCC's track record here, Petitioners' pleas that the issue should be remanded to the FCC have a distinctly hollow ring. The FCC's rulings in the Universal Service Order give the Court all the analytical tools necessary to resolve this issue and put this debate to an end.

E. The Eleventh Circuit's Decision Is Fully Consistent With Congress' Policy Of Promoting Deployment Of High-Speed Services.

Petitioners argue that the decision below is contrary to Congressional policy promoting high-speed Internet access. Even if the Court is compelled to reach beyond the clear language of the statute to address these policy arguments, Petitioners' arguments fail because the court of appeals' decision is fully consistent with Congressional policy.

In 1996, Congress directed the FCC to "encourage the deployment * * * of advanced telecommunications capability to all Americans * * * by * * * regulating methods that remove barriers to infrastructure investment." 47 U.S.C. § 157, statutory note. In addition, in Section 509 of the 1996 Act, Congress stated "[i]t is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). According to Petitioners, these two sections stand for the proposition that Congress cannot have intended to "penalize" the cable industry by eliminating rate regulation for attachments used by cable companies for the delivery of high-speed Internet services.

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and comment rulemaking, commenced by publication of a Notice of Proposed Rulemaking in the Federal Register.

Conspicuously absent from Petitioners' recitation of policy is 47 U.S.C. § 230(b)(2), in which Congress further declared: "It is the policy of the United States * * * to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*" 47 U.S.C. § 230(b)(2) (emphasis added). More fundamentally, it is one thing for Congress to declare a national policy to promote the deployment of the Internet; it is quite another for Congress to "pick winners and losers" in the Internet marketplace by bestowing a financial advantage on one group of Internet providers (and not others) through the mechanism of rate regulation. In the 1996 Act, Congress extended pole attachment rate regulation to telecommunications carriers, but *excluded* incumbent local exchange carriers. 47 U.S.C. § 224(a)(5). Incumbent local exchange carriers are the cable industry's largest competitors in the delivery of Internet service.[19] Placing cable Internet service outside of Section 224 means that cable companies and their chief competitors in the Internet business must pay the same unregulated rates for Internet attachments. Surely it is not reasonable to assume that Congress intended *sub silentio* to "subsidize" the

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[19] The FCC recently reported that "[m]ost residential and small business consumers currently receive Internet service from ISP's via traditional 'dial-up-telephone services provided by local exchange carriers (LECs) over copper wire. *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, GN Docket No. 00-185 (Sept. 28, 2000). In the area of high-speed Internet access, of the 4.3 million broadband lines the FCC recently reported to be connecting homes and small businesses to the Internet, nearly one million are served by asymmetric digital subscriber lines (ADSL) provided by local exchange carriers. FCC, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* (Oct. 31, 2000), *available at* http:www.fcc.gov/Bureaus/Common_Carrier/ News_ Re-leases/2000/nrcc0054.html. Moreover, the number of customers served by local exchange carriers increased 157% during the first half of 2000, *id.*, a trend which can be expected to continue.

cable industry's provision of high-speed Internet service, while simultaneously excluding this "subsidy" for their principal competitors. That conclusion would be anathema to a "free market . . . *unfettered by Federal or State regulation.*" 47 U.S.C. § 230(b)(2) (emphasis added).

II. SECTION 224 DOES NOT COVER ATTACHMENTS OF WIRELESS TELECOMMUNICATIONS EQUIPMENT.

Petitioners and their supporting *amici* [20] argue that Section 224(a)(4) defines a covered pole attachment as "any attachment . . . by a provider of telecommunications service," that "provider of a telecommunications service" includes wireless carriers, and thus that wireless carriers are entitled to a regulated rate for any type of facility they wish to attach, whether it is "wireless, wireline or some hybrid type of facility." Gov't Br. at 14.

This argument, while appealing, ultimately fails. It fails, in large part, because it focuses woodenly on the word "any" in the phrase "any attachment" and fails to ask the more pertinent question, which is what did Congress mean by an "attachment." Read as a whole, the statute and its legislative history make clear that Congress intended "attachment" to refer to wireline facilities.[21]

It is important to clarify that the question here is *not* whether Section 224 applies to attachments by wireless carriers. It most certainly does, and the utilities have never

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[20] The wireless companies and trade associations are participating in this case as *amici curiae*, rather than as petitioners, because they did not participate in the case before the Eleventh Circuit.

[21] Surely *some* form of limiting principle applies to the phrase "any attachment." Congress can hardly have intended Section 224 to mandate access for cable or telecommunications companies to hang anything at all, from advertising banners to clothes lines, on utility poles.

argued to the contrary. The dispute pertains to the *type of facilities* a wireless carrier can attach subject to Section 224 coverage; the question is whether Section 224 extends to wireless *equipment*, not to wireless *carriers*.[22] The utilities argued below, and the court of appeals agreed, that wireless *equipment* is not covered. The utilities have never taken the position that the *wireline* segments of a wireless carrier's network are outside of the statute. Petitioners' argument on this point is a complete red herring. Despite some imprecise language, the court of appeals' opinion is best read to hold that the FCC lacks jurisdiction to regulate attachments of wireless *equipment*, not wireless *carriers*. Thus, to the extent a wireless carrier seeks to attach a wireline facility to a utility pole, whether for "traffic backhaul, redundancy, intermodal operations," or other purposes, Br. of Association for Local Telecommunications Services, *et al.* as *Amici Curiae* (hereinafter, "Wireless *Amici*"), at 14, the wireline attachment is subject to Section 224.[23]

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[22] Wireless equipment is vastly different from wireline attachments. Unlike wireline attachments, wireless equipment has no need to be installed through the linear corridors of the poles, ducts, conduits and rights-of-way of a utility's distribution system. A wireless antenna is a discrete single point installation. Physically, wireline and wireless attachments are completely different. Wireless attachments typically include "an antenna or antenna clusters, a communications cabinet at the base of a pole, coaxial cables connecting antennas to the cabinet, concrete pads to support the cabinet, ground wires and trenching, and wires for telephone and electric service." Gov't Pet. App. at 96a, 13 F.C.C.R. at 6799 ¶42.

[23] Certain fixed wireless companies, which operate by placing an antenna on a rooftop and running wires into buildings, have argued before the FCC in a separate proceeding that easements utility companies have to run their wires inside buildings are "rights-of-way" within the meaning of Section 224 and thus that fixed wireless carriers are entitled to access these in-building pathways for their own wires to connect to their customers. *See, e.g., In re Promotion of Competitive Networks in Local Telecommunications Markets*, 15 F.C.C.R. 22,983 (2000). *See also,*

When the original pole attachment legislation was being considered in the mid-1970's, both the Administration and Congress were concerned about delegating jurisdiction over electric companies to the FCC. Thomas J. Hauser, head of the White House Office of Telecommunications Policy, expressed this concern in 1976 in written comments to the Chairman of the House subcommittee considering the legislation. The number one item on Mr. Hauser's list of concerns about the proposed legislation was "the efficacy and propriety of delegating jurisdiction over electric companies and other noncommunications utilities to the Commission." H.R. Rep. No 94-1630, at 33-34 (Add. B at 60a). The following year, the new acting head of that office expressed similar concerns: "We do not believe the FCC should be delegated general jurisdiction over the facilities of electric companies and other noncommunications utilities." H.R. Rep. No. 95-721, pt. 2, at 12 (1977) (Add. C at 85a). On the floor of the Senate, the legislation's sponsor, Senator Ernest Hollings, echoed this concern when he introduced the Senate version of the legislation. 123 Cong. Rec. 14,974 (May 17, 1977) ("* * * we should examine the appropriateness of dele-gating to the FCC jurisdiction over nontelephone company practices not heretofore within the ambit of that agency's authority").

Congress responded to these concerns by making a very narrow grant of additional jurisdiction to the FCC, which is

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Comments of Winstar Communications, Inc., WT Docket No. 99-217 (filed Aug. 27, 1999); *Comments of Teligent, Inc.*, WT Docket No. 99-217 (filed Aug. 27, 1999). The wireless companies have also argued that a license a utility company may have to place an antenna on a rooftop is also a "right-of-way" thus permitting the wireless company to piggy-back its own antennas on this site under Section 224. The utility companies' position is that neither its in-building easements nor its rooftop licenses are "rights-of-way," and thus fixed wireless companies do not have mandatory access to these in-building pathways and rooftop sites under Section 224.

explained in considerable detail in the Senate Report which accompanied the legislation. S. Rep. No. 95-580, *reprinted in* 1978 U.S.C.C.A.N. 109 (Add. A at 1a). The Report explains that the FCC's new jurisdiction will apply only in the "communications space" on a pole, which is the space used for the attachment of wire communications:

> Federal involvement in pole attachments matters will occur only where space on a utility pole has been designated and is actually being used for communications services *by wire or cable*. Thus . . . if provision has been made for attachment of *wire communications* a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission.
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> * * * *
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> This expansion of FCC regulatory authority is strictly circumscribed and extends only so far as is necessary to permit the Commission to involve itself in arrangements affecting the provision of utility pole communications space to CATV systems.

S. Rep. No. 95-580, at 15, *reprinted in* 1978 U.S.C.C.A.N at 123 (Add. A at 9a).

Congress implemented these jurisdictional limitations in three specific places in the statute. First, it defined a "utility" subject to the statute as "a person . . . who owns or controls poles, ducts, conduits or rights of way used, in whole or in part, *for wire communications*." 47 U.S.C. § 224(a)(1) (emphasis added). Second, it defined the "usable space" on a pole as the "the space above the minimum grade level which can be used for the attachment *of wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2) (emphasis added). Third, it established standards for the Commission's exercise of its authority to set rates for attachments by a

CATV system. 47 U.S.C. § 224(d)(1). The concept of "usable space" was built into this standard.[24]

An earlier version of the pole attachment legislation expressly called for regulation for "any attachment for wire communication" rather than the eventual "any attachment by a cable television system." H.R. Rep. No. 94-1630, at 2 (1976) (Add. B at 29a). This language was changed at the behest of the FCC, which wrote to Congress explaining that:

> under the proposed bill, the Commission might be involved in assuring just and reasonable rates for the use of poles by not only cable television system operators but also by many other users of wire communications. We understand that, in addition to cable systems, a large number of other entities utilize space on utility poles. These include public safety uses such as police, fire and traffic signaling, in addition to use by communications common carriers such as Western Union * * * It seems certain that the scope of a regulatory program designed to insure just and reasonable rates for the leasing of pole space by all these entities would be much larger than that necessary to insure just rates for cable systems. We would recommend therefore that if the legislative intent of this bill is merely to remedy pole attachment problems which are of importance to the cable industry, then its application should be so limited, preferably by inserting the term "cable television system" as defined by 47 C.F.R. § 76.5(a) in lieu of "wire communications."

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[24] Section 224(d) provided: "For purposes of subsection (b) of this section, a rate is just and reasonable if assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total *usable space*, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit or right-of-way." 47 U.S.C. § 224(d) (emphasis added).

H.R. Rep. No. 94-1630, at 30-31 (Add. B at 53a-54a). It was thus clear that the original statute was intended to cover wireline attachments. Cable companies attach wireline facilities to utility poles.

The only pertinent change Congress made in 1996 was to add "telecommunications carriers" to Section 224. Congress did not change the statute's jurisdictional restriction to utilities which own or control poles "used, in whole or in part, for *wire communications*." 47 U.S.C. § 224(a)(1). Congress also did not change the definition of "usable space," which continues to mean "the space above the minimum grade level which can be used for the attachment of *wires, cables, and associated equipment*." 47 U.S.C. § 224(d)(2). More importantly, Congress incorporated the term "usable space" into the new formula established in Section 224(e) for attachments by "telecommunications carriers." 47 U.S.C. §§ 224(d) (2), (3). Wireless carriers are "telecommunications carriers;" if their attachments are covered at all, they must be covered under the 224(e) formula. But this formula is defined in terms of *wires, cables and associated equipment*. To read Section 224(e) as covering wireless equipment would read the Section 224(d)(2) definition of "usable space" out of the statute.[25] The language Congress used in Section 224(d)(2) and Section 224(e) could hardly be more plain. Telecommunications carriers, including wireless carriers, are entitled to a regulated rate for attachments of *wires, cables and associated equipment*. Wireless facilities are not covered.

This conclusion is buttressed in a number of significant ways. First, as the court of appeals noted, there is not a single

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[25] Even the notion of the "space above the minimum grade" contained in the Section 224(d)(2)'s definition of usable space has no meaning in the case of wireless facilities, which typically include cables running down from the antenna or antenna cluster to a communications cabinet at the base of the pole, which itself sits on a concrete pad and is connected to a power source through ground wires buried in trenches.

mention of wireless telecommunications in Section 703 of the 1996 Act, which amended Section 224, or in its legislative history. Congress did, however, deal extensively with the siting of wireless equipment in the very next section of the 1996 Act, Section 704. Pub. L. No. 104-104, Title VII, at § 704(d), 110 Stat. 152 (codified at 47 U.S.C § 332) (Add. E at 93a-95a).[26] The siting of wireless equipment was a highly controversial subject in 1996, with the interests of wireless carriers clashing with the interests of local communities concerned about the placement, height, appearance, and potential negative health effects of wireless facilities.[27] In Section 704(a), which is entitled "National Wireless Telecommunications Siting Policy," Congress sought to reconcile these competing interests by guaranteeing that local authorities would retain ultimate control over decisions regarding the siting of wireless facilities while at the same time placing restrictions on their ability to deny applications for wireless siting authority.[28] Congress stated that nothing in the Act could "limit or affect the authority of the state or local government or instrumentality thereof over decisions

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[26] As the court of appeals noted, the wireless siting section of the Telecommunications Act of 1996 follows the pole attachment section; as codified, however, the two sections do not follow one another.

[27] For a comprehensive discussion of the many issues involved in wireless siting, *see* Kevin M. O'Neill, *Wireless Facilities Are A Towering Problem: How Can Local Zoning Boards Make The Call Without Violating Section 704 of the Telecommunications Act of 1996?*, 40 Wm. & Mary L. Rev. 975 (1999).

[28] Congressman Bliley, who chaired the House Commerce Committee that oversaw the passage of the Act, stated "nothing is in this Bill that prevents a locality . . . from determining where a cellular pole should be located . . . we do not allow a community to say that we are not going to have any cellular pole in our locality. That is wrong, nor are we going to say that they can delay these people forever. *But the location will be determined by the local governing body.*" -141 Cong. Rec. H8274 (Daily ed. Aug. 2, 1995) (Statement of Rep. Bliley) (emphasis added).

regarding the placement, construction, and modification of personal wireless service facilities." Telecommunications Act of 1996, Pub. L. No. 104-104, § 704 (codified at 47 U.S.C. § 332(c)(7)(A)(Supp. II 1996)) (Add. E at 93a).

Section 704(a) represents a careful balancing of the preservation of local zoning authority over the placement of wireless facilities and the federal interest in promoting the development of wireless services. Congress used Section 704 to impose several specific restrictions on local zoning boards considering applications for wireless facility placement. These include the requirement that the local zoning authorities (1) not discriminate among providers of functionally equivalent services, § 332(c)(7)(B)(i)(I); (2) not adopt rules that would have the effect of an outright prohibition on the provision of personal wireless services, § 332(c)(7)(B)(i)(II); (3) act on siting requests "within a reasonable amount of time;" and (4) issue decisions in writing supported by "substantial evidence contained in a written record," §§ 332(c)(7)(B)(ii) and (iii). Facility siting decisions can not be based on health and safety concerns so long as the wireless antennas otherwise meet the FCC's requirements in this area. § 332(c)(7)(B)(4). If a locality's actions violate Section 704, the legislation provides for accelerated judicial review within 30 days of the adverse action. § 332(c)(7)(B)(v).[29]

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[29] Congress dealt still further with wireless siting in Section 704(c), establishing a national policy of making Federal government property available for the placement of wireless telecommunications equipment. 47 U.S.C. § 332, statutory note. This subsection does not impose regulated rates for placement of wireless equipment on federal property; to the contrary, wireless sites are leased from the federal government at market rates. *See Facilitating Access to Federal Property for the Siting of Mobile Services, President's Memorandum on Mobile Service Antennas*, 31 Weekly Comp. Pres. Doc. 1424; 60 Fed. Reg. 42,023 (Aug. 10, 1995) (Presidential directive to make federal buildings available for siting wireless equipment); *see also, Placement of Commercial Antennas on*

As the court of appeals properly noted, Congress dealt comprehensively with the controversial issue of wireless siting in the "National Wireless Telecommunications Siting Policy" established in 47 U.S.C. § 332. The specificity with which Congress addressed wireless siting in Section 332 surely indicates it did not intend that Section 224 provide the FCC authority to regulate the siting of wireless equipment.

Even more fundamentally, the Pole Attachments Act is designed to deal with the potential exercise of monopoly power over bottleneck facilities. Utility poles are not, even potentially, bottleneck facilities for wireless equipment. Wireless equipment can be sited on virtually any tall building or structure, such as rooftops, communications towers, water towers, monopoles, billboards, highway light structures, church steeples, etc. Indeed, an entire commercial industry has emerged which is dedicated to siting wireless equipment. As the court of appeals stated, it is "beyond question * * * that utility poles are not bottleneck facilities for wireless systems." Gov't Pet. App. at 25a; 208 F.3d at 1275. Because they are not, the court of appeals properly held Section 224 does not cover wireless attachments.[30]

Federal Property, 61 Fed. Reg. 14,100 (Mar. 29, 1996) (General Services Administration guidelines), 64 Fed. Reg. 30,523 (May 28, 1999) (extending guidelines indefinitely); *Placement of Commercial Antennas on Federal Property*, 62 Fed. Reg. 32,611, 32,613 (June 6, 1997) (same); 64 Fed. Reg. 30,523 (May 28, 1999) (extending guidelines indefinitely); *Public Buildings and Space*, 63 Fed. Reg. 10,631 (Mar. 4, 1998) (same); *Pricing Policy for Occupancy of GSA Space*, 66 Fed. Reg. 23,169 (May 8, 2001) (interim rule).

[30] The claim of the Wireless *Amici* that there is no support in the record for the court's factual finding is untrue. On September 15, 1998, UTC, a trade association representing the telecommunications interests of utility companies, submitted comments in the FCC docket in the rulemaking below detailing at length the robust competitive market that exists for siting wireless equipment. United Telecom Council, Ex Parte Notice, CS Docket No. 97-151 (filed Sept. 15, 1998).

The Wireless *Amici* make three arguments against the factual conclusion that utility poles are not bottlenecks for wireless equipment. First, they argue that utility poles are bottleneck facilities because they are bottlenecks for the *wireline* segments of a wireless carrier's network. As discussed *supra*, this is a straw man argument, since utilities have always acknowledged that wireline facilities of a wireless carrier are covered by Section 224.[31] Second, the Wireless *Amici* argue that utility facilities are bottlenecks because fixed wireless carriers must place their antennas on the rooftops of buildings they service and run their wires through in-building pathways. Again, to the extent wireline facilities are involved, the utilities agree that Section 224 is theoretically applicable, although the utilities do not believe in-building pathways are covered by the Act. As to rooftops, control of antenna sites rests with the building owner, not the utility company; utilities can hardly be bottlenecks. Finally, the Wireless *Amici* spend several pages cataloging the fact that electric utility companies are in the business of providing wireless antenna sites on utility facilities. Br. at 16-17. Although the point the Wireless *Amici* purport to be making by this is obscure, the fact of the matter is that some (but by no means all) [32] electric utility companies are enthusiastically involved in the robust free market for wireless sites through the use of free-standing communications towers and transmission towers in their system.[33] Utility companies

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[31] This straw man argument is the *only* argument the Government makes as to why utility poles are allegedly not bottleneck facilities. Gov't Br. at 34-5.

[32] The Southern Companies do not currently market their transmission towers for any type of pole attachment.

[33] As the brief of *amici* Site Owners and Managers Alliance demonstrates, there is a vibrant free market for wireless sites. Indeed, even wireless carriers themselves have gone into the tower business. Sprint Communications has established a subsidiary specifically to exploit the free market for wireless sites. Sprint Sites USA, *About Us, at*

charge a market rate for these antenna sites, as do their competitors—tower companies, building owners, billboard owners, municipalities, etc. But the fact that wireless carriers *do* site antennas on utility facilities certainly does not make utility facilities bottlenecks.

Even if utility poles are not bottleneck facilities for wireless equipment, the Government argues that Section 224 does not use the term "bottleneck facility" or any cognate term, Gov't Br. at 34, and thus the statute applies by its terms to wireless equipment regardless of whether utility poles are bottlenecks for the attachment. The Government support this argument by citing to *Brogan v. United States*, 522 U.S. 398, 403 (1998) for the proposition that "it is not, and cannot be, [judicial] practice to restrict the unqualified language of the statute to the particular evil that Congress was trying to remedy." This argument is meritless, since the text of Section 224(d)(2) makes it clear that the statute *by its terms* applies to wires, cables and associated equipment. Moreover, even the most ardent textualist may wonder about the wisdom of interpreting a statute in a way that makes its central purpose—to address the potential exercise of monopoly power over bottleneck facilities—irrelevant. In any event, the issue is academic, since the statute is clear if one takes the trouble to read all of its terms. As on the cable Internet question, the Government and the Wireless *Amici* wish to

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http://www.sprintsites.com/about.html (last visited May 10, 2001) ("Sprint Sites USA was created to manage and operate Sprint's portfolio of more than 4,600 towers for the wireless communications industry."). Similarly, 360° Communications Company, which provides wireless voice and data services to 2.6 million customers, has leased its antenna sites to Omnipoint Communications, the second-largest publicly traded PCS company in the U.S. *360° Communications Signs Tower Collocation Agreement with Omnipoint Communications, available at* http//www.prnewswire.com/gh/cnoc/comp/ 111849.html (April 29, 1998). (360° Communications merged with Alltel Corp. in July 1998, *see* Alltel Corp., SEC Form 10-K 405 at 2 (filed Mar. 1, 2001)).

latch on to certain bits of the statute that support their position and to ignore the rest. From time immemorial, this has not been a permissible way to read a statute.

A vibrant free market exists for wireless sites, on towers, on monopoles, on rooftops, on billboards, on church steeples. The market rate for leasing wireless sites varies widely, but typically is $1,500 to $2,000 per month. A regulated pole attachment rate is about $6 per *year*. Congress ought not to be presumed to have taking the dramatic step of regulating the wireless siting market—or more precisely, a tiny segment of the wireless siting market—in Section 224 without saying a word, particularly given its comprehensive treatment of this highly controversial subject elsewhere in the 1996 Act. Section 224 does not reflect the kind of "textual commitment of authority" to the FCC to regulate wireless siting which this Court has held to be a necessary predicate to the exercise of agency power. *See Whitman v. American Trucking Ass'n, Inc.*, 121 S. Ct. 903, 910 (2001) ("Congress * * * does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *MCI Telecomm. Corp. v. American Tel. & Tel. Co.* 512 U.S. 218, 231 (1994)("it is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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